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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Colusa)

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY CARL KILGORE,

Defendant and Appellant.

C060057

(Super. Ct. No.
CR49219)

A jury convicted defendant Gregory Carl Kilgore of possession of heroin (count 1; Health & Saf. Code, § 11350, subd. (a)), possession of cocaine (count 2; Health & Saf. Code, § 11350, subd. (a)), possession of heroin for sale (count 3; Health & Saf. Code, § 11351), transportation of heroin (count 5; Health & Saf. Code, § 11352, subd. (a)), transportation of cocaine (count 6; Health & Saf. Code, § 11352, subd. (a)), and misdemeanor possession of drug paraphernalia (count 7; Health & Saf. Code, § 11364). The jury acquitted defendant of possession of cocaine for sale (count 4; Health & Saf. Code, § 11351).

In a bifurcated proceeding, defendant admitted a prior prison term (Pen. Code, § 667.5, subd. (b)) and a prior drug conviction (Health & Saf. Code, § 11370.2).

The trial court sentenced defendant to a state prison term of nine years, including the upper term of five years on count 5 and four years for the enhancements; the court also imposed the upper term on the remaining counts but stayed sentence pursuant to Penal Code section 654. The court also ordered defendant to serve 15 days in county jail for the misdemeanor count. The court imposed various fines and fees, including a \$120 court security fee (Pen. Code, § 1465.8).

Defendant contends that his conviction on count 1 (simple possession of heroin) must be stricken because it is a lesser included offense of count 3 (possession of heroin for sale), and that in consequence the court security fee must be reduced to \$100. The People concede both points. We shall modify the judgment to strike the conviction on count 1 and reduce the court security fee to \$100, and affirm the judgment as modified.

FACTS AND PROCEEDINGS

A California Highway Patrol officer who detained defendant in a traffic stop observed that he appeared to be under the influence of narcotics. Defendant admitted having recently used cocaine. The officer observed a metallic tube in defendant's car of a kind commonly used for smoking cocaine, and a small blue baggie of a size commonly used to hold narcotics.

The officer arrested defendant for driving under the influence, then performed an inventory search of the car, which uncovered objects containing what appeared to be cocaine and heroin. Defendant admitted that the substances in these containers were, in fact, cocaine and heroin.

The containers held 33.05 grams of cocaine and 46.34 grams of heroin. An officer testifying as a drug expert opined that both drugs were possessed for sale.

DISCUSSION

I

Although a defendant may generally be convicted of more than one crime arising out of the same act or course of conduct (Pen. Code, § 954; *People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227), the courts have created an exception to this rule where multiple convictions are based on “necessarily included offenses.” (Reed, *supra*, 38 Cal.4th at p. 1227, quoting *People v. Montoya* (2004) 33 Cal.3d 1031, 1034.) If an offense is a lesser included offense under the statutory “elements” test (i.e., if all the elements of the lesser offense as defined by statute are necessarily included in the greater offense), the defendant may properly be convicted only of the greater offense. (Reed, *supra*, 38 Cal.4th at p. 1229; *Montoya, supra*, 33 Cal.3d at p. 1034.)

As the parties agree, the offense of simple possession of heroin is necessarily included within the offense of possession of heroin for sale. The elements of simple possession of a

controlled substance are possession of the substance, knowledge of its presence, knowledge of its nature as a controlled substance, and a usable amount of the substance; the elements of possession of a controlled substance for sale include all of these, plus the specific intent to sell. (Health & Saf. Code, §§ 11350, subd. (a), 11351; *People v. Montero* (2007) 155 Cal.App.4th 1170, 1175.) Moreover, the prosecutor's argument to the jury made clear that both crimes were charged based on possession of the same heroin on the same occasion.

When the jury convicts a defendant of both the greater and the lesser offense, and the evidence supports the verdict as to the greater offense, the conviction of the lesser offense must be reversed. (*People v. Moran* (1970) 1 Cal.3d 755, 763.) We therefore reverse defendant's conviction on count 1.

II

Defendant contends, and the People agree, that the reversal of his conviction on count 1 requires the reduction of the court security fee imposed on him from \$120 to \$100. Penal Code section 1465.8, under which the fee was imposed, provides that a fee of \$20 shall be imposed "on every conviction for a criminal offense." The fee imposed was calculated based on defendant's conviction of six offenses. Since he now stands convicted of only five offenses, the court security fee must be reduced correspondingly.

DISPOSITION

Defendant's conviction on count 1 is hereby stricken, and the court security fee imposed under Penal Code section 1465.8 is reduced to \$100. The matter is remanded to the trial court with directions to prepare a corrected abstract of judgment reflecting these changes and to forward a certified copy thereof to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

HULL, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.